

No. 495741-II

Court of Appeals
DIVISION II
STATE OF WASHINGTON

DONALD LEO,

APPELLANT,

v.

DIANA COURT OWNERS' ASSOCIATION, an unincorporated association and
VISTA VILLAGE RECREATIONAL AND MAINTENANCE ASSOCIATION, a not-for-profit
corporation,

RESPONDENTS.

APPELLANT DONALD LEO'S REPLY BRIEF

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I. INTRODUCTION

Appellant Donald Leo submits this Reply Brief.

II. SUMMARY

Paragraph 11 of the Diana Court Declaration provides that amendments to bylaws governing the administration of Diana Court are effective only if approved by a majority of the unit owners living in Diana Court. In 2015, VVRMA proposed, and is now attempting to enforce, amended bylaws for the administration of Diana Court which provide that future amendments to the bylaws will be effective even if a majority of the owners of living units in Diana Court have not voted to approve them. Because these amended bylaws conflict with the requirements of the Declaration, and because the provisions of the Declaration control, the trial court should have, and this Court should, hold that the amendments to the bylaws are not enforceable.

In addition, RCW 64.34.360(3) permits the Board of the condominium association to impose the cost associated with the operation, maintenance, repair or replacement of a limited common area upon the owner to whom the use of the limited common area has been assigned only if the Declaration so REQUIRES. Here, nothing in the Diana Court Declaration so REQUIRES. The Court should so hold, and remand with

instructions that the trial court enter an order enjoining VVRMA from engaging in this practice in the future.

Finally, the Court should find that Mr. Leo is entitled to an award of his reasonable attorney's fees, both below and on appeal.

III. ANALYSIS

A. Because they are inconsistent with the provisions of the Diana Court Declaration, the 2015 amendment to the bylaws may not be enforced.

Paragraph 11 of the Diana Court Declaration provides that amendments to bylaws governing the administration of the Diana Court Condominiums are effective only if approved by a majority of the owners of living units in Diana Court. The amended bylaws proposed in 2015 by VVRMA, but not approved by an affirmative vote of the majority of the unit owners living in Diana Court, purport to make future amendments to the bylaws effective even though they have not been approved by a majority of the owners of living units in Diana Court. Because the provisions of the Declaration prevail over inconsistent provisions in the bylaws, the 2015 bylaws cannot be enforced. This Court should reverse the decision of the trial court, and remand with instructions to the trial court to enter a judgment so holding.

1. Paragraph 11 of the Diana Court Declaration requires that any amendment to the bylaws applicable to the administration of the Diana Court Condominium must be approved by an affirmative vote of the majority of the owners of living units in Diana Court to become effective.

Paragraph 11 of the Diana Court Declaration requires that any amendment to the bylaws applicable to the administration of the Diana Court Condominium must be approved by an affirmative vote of the majority of the owners of living units in Diana Court to become effective:

By-laws: By-laws for the administration of the Diana Court Owners Association and the development, and for other purposes not inconsistent with the Condominium Act or with the terms or intent of this Declaration, shall be adopted **by an affirmative vote of a majority of the owners of the living units** at a meeting to be called and held for that purpose. Notice of the time, place and purpose of such meeting shall be delivered to each owner at least ten days prior to such meeting. Amendments to the bylaws may be adopted by the same vote at a meeting similarly called . . .

CP 42 (Diana Court Dec., ¶ 11) (emphasis added).

Pursuant to paragraph 11 of the Diana Court Declaration, to become effective, amendments to the bylaws applicable to the administration of the Diana Court Owner's Association must be approved by an affirmative vote of the majority of the owners of living units in Diana Court.

2. The bylaws at issue in this case are bylaws for the administration of Diana Court.

The bylaws at issue in this case are bylaws of the Diana Court Owners' Association for the administration of Diana Court.

The bylaws presented to the Court in this case state:

AMENDED AND RESTATED VISTA VILLAGE
CONDOMINIUMS BYLAWS OF THE COURT
OWNERS' ASSOCIATIONS, including ATHENA,
BACCHUS, CALYPSO, DIANA, AND ELECTRA
COURTS.

Article 1

Identity

Section 1. These are the amended and restated bylaws of the court owners' associations (COAs), associations organized for the purpose of administering five condominium courts respectively, (1) Athena Court, (2) Bacchus Court, (3) Calypso Court, (4) Diana Court, and (5) Electra Court . . .

CP 50 (Leo Dec., Ex. B). See also CP 61, 76.

These bylaws, on their face, state that they are bylaws of the Diana Court Owners' Association "for the purpose of administering" Diana Court. VVRMA admits this. VVRMA Brief, p. 4.

The trial court plainly erred in basing its ruling against Mr. Leo on this issue upon its misunderstanding that these bylaws were "VVRMA bylaws," not "bylaws for the administration of the Diana Court" to which paragraph 11 of the Diana Court Declaration applies. See RP (September 23, 2016) at p. 36, lines 4-13. Respondents do not claim otherwise.

Pursuant to paragraph 11 of the Diana Court Declaration, as "bylaws for the administration of the Diana Court Owners' Association,"

"for the purpose of administering" Diana Court, these bylaws can only be effective if they are adopted by an affirmative vote of a majority of the owners of the living units in Diana Court.

3. The 2015 amendment to the bylaws provides for future amendments to the bylaws to take effect even though a majority of the owners of the living units in Diana Court have not voted to adopt the amendments.

The 2015 amendment to the bylaws provides for future amendments to these bylaws to take effect even though a majority of the owners of the living units in Diana Court have not voted to adopt the amendments.

The 2015 amendment to the bylaws proposed by VVRMA provide:

These amended and restated by-laws, or any part thereof, may be amended by the approval of three out of the five COAs after one COA has voted its approval and made recommendations to the other COAs. Each COA shall vote within 30 days according to Section 11 of its Declarational Covenants, Conditions and Restrictions as identified in Article 1, Section 1 above. This is subject to the power of all owners to approve, change or repeal such by-laws by a majority vote at any general meeting or at any other meeting of all owners called for that purpose.

CP 82.

Pursuant to this proposed amendment, future amendments to the bylaws will be effective if they are approved by the majority vote of members of three of the five condominium owners' associations within

Vista Village. This would mean future amended bylaws may become effective even though they have not been approved by the majority vote of the majority of the owners of living units in Diana Court. Indeed, future bylaws may become effective even though not a single Diana Court unit owner may have voted to approve the amended bylaws.

Paragraph 11 of the Diana Court Declaration reserves to Diana Court unit owners the right to be subject only to bylaws approved by a majority vote of the owners of living units in Diana Court. But the 2015 amendment proposed by VVRMA, and which VVRMA is now purporting to enforce, provides for future amendments to the bylaws to become effective even though the proposed bylaw amendments have not been adopted by a majority vote of the owners of living units in Diana Court, as paragraph 11 of the Diana Court Declaration requires. These provisions are inconsistent.

4. Because the provisions of the Declaration and the provisions of the bylaws are inconsistent, the Declaration's provisions control.

Because the provisions of the Declaration and the provisions of the bylaws are inconsistent, the Declaration's provisions control.

The Legislature has provided that in the event of a conflict, the provisions of a declaration control over inconsistent bylaws:

In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails....

RCW 64.34.208(3). See also *Shorewood West Condominium Ass'n v. Sadri*, 140 Wn. 2d 47, 992 P. 2d 1008 (2000) (the provisions of a condominium declaration control over inconsistent provisions in the bylaws).

Here, because they provide for future amendments to the bylaws to become effective even though they have not been approved by a majority of the owners of living units in Diana Court, the proposed amended bylaws conflict with the provisions of paragraph 11 of the Diana Court Declaration. Pursuant to RCW 64.34.208(3), the provisions of the Declaration control. Therefore, the trial court should have, and this Court should, hold that the 2015 amended bylaws are without force and effect.

5. Paragraph 21 of the Diana Court Declaration does not constitute a delegation of authority to VVRMA to impose bylaws or assessments contrary to the rights the Declaration grants to Diana Court unit owners.

Respondents do not directly respond to the foregoing analysis. Instead, Respondents argue that paragraph 21 of the Diana Court Declaration constitutes a delegation of the authority to impose bylaws and assessments contrary to the rights the Declaration grants to Diana Court unit owners to be subject only to bylaws approved by the majority vote of

the owners of living units in Diana Court. The Court should reject this argument.

The Diana Court Declaration was recorded in 1975. CP 35. At that time, the Legislature had enacted only the Horizontal Property Regimes Act, Chapter 62.32 RCW. Nothing in the Horizontal Property Regimes Act provides for the establishment of Master Associations. They were unheard of at that time.

Accordingly, the Diana Court Declaration provides for the establishment of the Vista Village Recreational and Maintenance Association, not as a Master Association, but as an entity to own and operate common facilities, such as a swimming pool or clubhouse:

21. Membership in Vista Village Recreational and Maintenance Association.

Every person or entity acquiring an ownership interest in a living unit under this declaration shall become a member of the Vista Village Recreational and Maintenance Association, and by acquiring said ownership interest shall become bound by the rules and regulations and By-Laws of said Association as established by the Board of Directors of the Vista Village Recreational and Maintenance Association; and further, said purchasers acknowledge that the benefits of membership in the Vista Village Recreational and Maintenance Association are covenants running with the land and that membership in said Association may be terminated only by selling the ownership interest created under the Declaration.

Membership in the Vista Village Recreational and Maintenance Association shall include the obligation to pay dues and assessments as established by the Board of Directors of said Association according to the By-Laws of the Vista Village Recreational and Maintenance Association.

Turn Key Development, Inc. may from time to time convey to Vista Village Recreational and Maintenance Association, a non-profit Washington Corporation, **certain property and rights to be used and enjoyed as common facilities for the benefit of the members of the Vista Village Recreational and Maintenance Association.** There shall be one membership in the Vista Village Recreational and Maintenance Association for each condominium living unit. Each membership for condominium living unit shall be appurtenant to the title and shall be transferable only as part of the transfer of the title of the condominium living unit. Each such membership shall entitle the owners of the condominium living unit, the residence thereon, and their families to enjoy the facilities of the association, subject to the rules, regulations, payments, and bylaws as may now or hereinafter be established by the association, which rules, regulations, payments, and by-laws shall apply equally to all memberships. Memberships in the Vista Village Recreational and Maintenance Association shall be available to the incorporators and the fee owners or contract purchasers of any condominium living unit located in (1) Diana Court Condominium and (2) the approximate 105 acres adjacent to Diana Court, described in that certain option entered into by Turn Key Development, Inc. on February 24, 1972, as such property named hereafter be developed by Turn Key Development, Inc., into a series of condominiums of which, if so developed, shall be known as Vista Village, Long Lake Condominium Community.

Portions of the real property, if any, used by the Vista Village Recreational and Maintenance Association shall not be subject to the restrictions elsewhere imposed herein but **shall be used for common service facilities** as the Vista

Village Recreational and Maintenance Association deems advisable for the benefit of its members.

CP 22 (emphasis added).

Paragraph 21 of the Diana Court Declaration establishes the Vista Village Recreational and Maintenance Association as an entity into which the original developer could convey common facilities, such as a swimming pool or clubhouse, the right to use which was to be made available to the unit owners of all of the condominium units in all of the Vista Village condominiums. Paragraph 21 requires all condominium owners to become members of this entity, and pay dues, in order to provide rules governing and to provide for the cost of operating and maintaining the common amenities to be used by the members of all five condominium associations. **Paragraph 21 has nothing whatsoever to do with VVRMA as a Master Association.**

In 1989, the Legislature passed the Uniform Condominium Act, which became effective July 1, 1990. 1989 Wash. Laws Ch. 43. The Uniform Condominium Act authorizes the creation of Master Associations, and authorizes condominium owners' associations to delegate certain of their powers to such a Master Association. RCW 64.34.276. However, the Legislature only authorized Master Associations to exercise such power as was delegated to them by an individual

condominium owners' association, and explicitly provided that Master Associations were subject to the same limitations in the exercise of this delegated power as imposed on individual condominium owners associations under the Act. RCW 64.34.276(1), (2) ("[A]ll provisions of this chapter applicable to unit owners' associations apply to any such [Master Association]"). This includes the limitation that the terms of the condominium's declaration prevail over any inconsistent bylaws. RCW 64.34.208(3).

In 1992, Diana Court amended its Declaration to add paragraph 14(f), which authorizes the Diana Court Owners' Association to delegate powers to VVRMA as a Master Association:

The Board with the concurrence of the membership of the association, is hereby authorized to delegate to Vista Village Recreation and Maintenance Association, formerly Panorama Park Recreation and Maintenance Association, as referred to in Paragraph 21, below, all the powers enumerated in Section 3-102 of the Washington Condominium Act (now codified as RCW 64.34) which are currently exercisable by the Board on terms to be negotiated or as authorized by the BYLAWS of the Association.

CP 141. See also Note at the top of CP 141, noting that the Declaration was amended April 23, 1992 to add paragraph (f). Paragraph 14(f), and not paragraph 21, is the paragraph that authorizes the delegation of the

Diana Court Owners' Association's authority to VVRMA as a Master Association.

Paragraph 21 of the Diana Court Declaration thus has nothing to do with VVRMA's status as a Master Association. Accordingly, nothing in paragraph 21 constitutes a delegation of authority by the Diana Court Owners' Association or its Board of Directors to the VVRMA as a Master Association. The Respondents' argument to the contrary fails.

Moreover, even if paragraph 21 of the Diana Court Declaration somehow applied to the VVRMA in its status as a Master Association (and it does not), the Court should hold that paragraph 21 constitutes no more than a general delegation of authority, and that paragraph 11's more specific limitations on that authority prevail over paragraph 21's more general terms.

First, the Court should interpret the Diana Court Declaration so that each of its provisions has independent force and effect, in a way that does not render any of its provisions superfluous or meaningless. *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wash.App. 353, 361, 127 P.3d 762 (2006), as cited at VVRMA brief, p. 11, Diana Court brief, p. 7,

Here, Respondents propose to construe paragraph 21 of the Diana Court Declaration as giving VVRMA an unfettered ability to enforce whatever bylaws for the administration of the Diana Court Condominium it pleases. This construction of the Diana Court Declaration impermissibly renders the language of paragraph 11—requiring bylaws to be approved by the majority of the owners of living units in Diana Court—entirely superfluous. Under the Respondents' construction, paragraph 11's language has never, does not, and will never have any force or effect.

Second, Respondents' construction ignores the well settled rule of contract interpretation that specific language prevails over more general language. *Grey v. Leach*, 158 Wn.App 837, 244 P.3d 970 (2010), citing *Wash. Local Lodge No. 104 of Int'l Bhd. of Boilermakers v. Int'l Bhd. of Boilermakers*, 28 Wn.2d 536, 541, 183 P.2d 504 (1947).

Here, at the very most, paragraph 21 grants VVRMA a general authority to propose and enforce bylaws, and to adopt budgets and impose assessments. However, as the Legislature has specifically provided in RCW 64.34.276(1), in exercising that authority, the VVRMA remains subject to the same restrictions as would apply to Diana Court Owners' Association. This includes the restriction that the provisions of the Diana

Court Declaration prevail over any bylaws for the administration of the Diana Court inconsistent with the Declaration. RCW 64.34.208(3).

The specific rights conferred on Diana Court unit owners in paragraph 11 of the Diana Court Declaration prevail over the more general language of paragraph 21.

6. The Court should reverse and remand with instructions that the trial court enter an order declaring the 2015 bylaws to be inconsistent with paragraph 11 of the Diana Court Declaration, and enjoining VVRMA from attempting to enforce these amended bylaws.

In conclusion, paragraph 11 of the Diana Court Declaration provides that amendments to bylaws governing the administration of Diana Court are effective only if approved by a majority of the unit owners living in Diana Court. The bylaws of the Diana Court Owners' Association for the administration of Diana Court which VVRMA proposed in 2015, and which it is now attempting to enforce, are not consistent with paragraph 11. Because the proposed bylaws conflict with the requirements that the Declaration, and because of the provisions of the Declaration control, the trial court should have, and this Court should, hold that the 2015 amendments to bylaws are not enforceable.

The Court should reverse and remand with instructions that the trial court enter an order declaring the 2015 amendments to the bylaws to

be inconsistent with paragraph 11 of the Diana Court Declaration, and enjoining VVRMA from attempting to enforce the amendments.

B. Because nothing in the Diana Court Declaration REQUIRES it, the VVRMA's practice of imposing assessments for the cost of the maintenance, operation, repair and replacement of limited common areas solely upon the unit owners to whom the use of those limited common areas has been assigned violates RCW 64.34.360(3).

1. The Legislature has generally required that common expenses be shared equally, and the Diana Court Declaration adopts this rule.

The Legislature has generally required that assessments for common expenses be imposed equally. See RCW 64.32.080 (requiring common expenses to be charged to all owners based on their percentage of ownership of undivided interest in the common areas). See also RCW 64.34.360(1) ("The association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements").

The Diana Court Declaration follows this rule. Paragraph 14(a) of the Declaration requires assessments for common expenses to be imposed on all units evenly, on either a "per unit" or "per square footage" basis. CP 43. Nothing in the Diana Court Declaration separately addresses the expense associated with the operation, maintenance, repair or replacement

of limited common areas, or REQUIRES that assessments be imposed for them in any different manner.

2. The Legislature has authorized condominium associations to impose the cost of the operation, maintenance, repair or replacement of limited common elements upon the owner of the unit to which the limited common element is assigned, but only to the extent REQUIRED by the Declaration.

The Legislature has authorized condominium associations to impose the cost of the operation, maintenance, repair or replacement of limited common elements upon the owner of the unit to which the limited common element is assigned, but only to the extent REQUIRED by the declaration.

RCW 64.34.360(3) provides:

To the extent REQUIRED by the declaration:

(a) Any common expense associated with the operation, maintenance, repair, or replacement of a limited common element shall be paid by the owner of or assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

(b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; . . .

(emphasis added).

The opening phrase controls the balance of this subsection. RCW 64.34.360(3) allows a condominium association to assess the common

expenses associated with the operation, maintenance, repair or replacement of a limited common element upon the owner of or assessed against the units to which that limited common element is assigned **if, and only if, REQUIRED by the Declaration.**

3. The Defendants' construction of this statute ignores the phrase "to the extent REQUIRED by the declaration" with which the statute begins.

The Defendants' construction of this statute ignores the phrase "to the extent REQUIRED by the declaration" with which the statute begins.

First, VVRMA argues that the relevant statutory scheme permits assessment of expenses related to limited common elements solely against those owners who benefit from the use of those elements. VVRMA Brief at p. 14-15. In so arguing, VVRMA simply ignores the limitation imposed by the opening clause of RCW 64.34.360, which only allows the assessment of limited common expenses upon individual owners "to the extent REQUIRED by the Declaration." This statutory limitation applies to the VVRMA in the exercise of the power to impose assessments delegated to it by the Diana Court Owners' Association. RCW 64.34.276(1). Because nothing in the Diana Court Declaration REQUIRES expenses to be so assessed, VVRMA is not entitled to assess

these expenses on anything other than a share and share alike basis. VVRMA's argument fails.

Second, VVRMA points to RCW 64.34.360(b), which provides that any common expense benefitting fewer than all the units must be assessed exclusively against the units benefitted. VVRMA Brief at p. 15. However, subsection (a), which is more specifically directed to limited common area expenses, applies here. And in any event, both subsections apply only "to the extent REQUIRED by the Declaration," and there is nothing in the Diana Court Declaration that so REQUIRES.

Third, VVRMA points to the VVRMA's own bylaws. VVRMA Brief at p. 13-14. But RCW 64.34.360(3) only provides for the imposition of such a rule "to the extent required by the DECLARATION." What the VVRMA bylaws provide is irrelevant.

Finally, VVRMA argues that the declaration incorporates the bylaws by reference. VVRMA brief at p. 14-15. This grossly distorts the meaning of paragraph 14 of the Diana Court Declaration

Paragraph 14 requires annual assessment of common expenses against all unit owners share and share alike, either on a per unit, or on a square footage, basis. It then authorizes the imposition of supplemental assessments if the initial annual assessment proves insufficient to pay all

expenses, which supplemental assessment shall be assessed in the same manner as the initial assessment "unless otherwise provided herein."

VVRMA argues that the word "herein" somehow refers to and incorporates bylaws. It does not.

The word "herein" means:

Herein, *adv.* . . . In this thing (such as a document, section, or paragraph).

Black's Law Dictionary (9th ed. 2009) at 795.

As used in paragraph 14, the word "herein" refers either to paragraph 14, or to the Declaration of which paragraph 14 is a part. It does not refer to other documents, such as bylaws.

VVRMA's suggestion that the word "herein" refers to and incorporates bylaws also ignores the Legislative mandate reflected in the opening paragraph of RCW 64.34.360(3), which provides for the imposition of limited common areas upon all owners unless the DECLARATION requires otherwise.

In sum, RCW 64.34.360(3) allows the imposition of limited common area expenses upon individual owners only if the Declaration so REQUIRES it. Respondents' arguments that VVRMA is entitled to impose assessments for limited common area expenses solely upon

specific owners, even though nothing in the Diana Court Declaration so REQUIRES, fail.

4. The Court should reverse the trial court, and remand with instructions that the trial court enter a judgment enjoining VVRMA from imposing such assessments in the future.

In sum, Respondents have not explained why the VVRMA, in exercising the power delegated to it by the Diana Court Owners' Association to impose assessments for the cost of operating, maintaining, repairing and replacing limited common elements, is not subject to the rule the Legislature adopted in the opening part of RCW 64.34.360(3). In that statute, the Legislature provided that such expenses could be assessed against individual unit owners as provided in that statute only to the extent REQUIRED by the Declaration. The Respondents here do not claim that there is anything in the Declaration that so REQUIRES.

Therefore, the trial court should have, and this Court should, hold that the VVRMA's actions in attempting to impose these costs solely upon individual unit owners violates this statute. The Court should reverse the judgment of the trial court, and remand with instructions that the trial court enter a judgment enjoining VVRMA from imposing such assessments in the future.

C. The Court should award Mr. Leo his reasonable attorney's fees, both before the trial court and on appeal.

Finally, assuming Mr. Leo is the prevailing party, the Court should award him attorney's fees, both before the trial court and on appeal. VVRMA concedes that RCW 64.34.455 authorizes such an award. VVRMA Brief at 16.

Mr. Leo brought this action in order to compel VVRMA to comply with legal requirements imposed on it by the Legislature. If he prevails, Mr. Leo's action will have benefitted not only himself, but also other unit owners who have been subject to VVRMA's efforts to enforce illegal bylaws, and to shift the cost of common expenses solely upon individual unit owners. To the extent Mr. Leo prevails, the Court should award him his reasonable attorney's fees, both before the trial court and on appeal.

OWENS DAVIES, P.S.

A handwritten signature in dark ink, appearing to read "Matt Edwards", is written over a horizontal line.

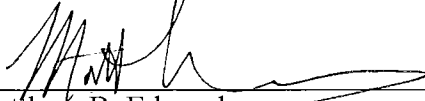
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I certify that on the 2nd day of February, 2017,
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